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In the Supreme Court of the United States

GREEN TREE FINANCIAL CORP.-ALABAMA AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

vs.

LARKETTA RANDOLPH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF NATIONAL ARBITRATION FORUM AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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The National Arbitration Forum ("the Forum") submits this *amicus curiae* brief in support of neither party. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Forum consists of a nationwide network of more than 500 independent arbitrators — former members of the judiciary, law professors, and senior attorneys — and a professional staff, based in Saint Paul, Minnesota, that processes the claims much like a court clerk's office. In a recent decision upholding an agreement that provided for Forum-administered arbitration, the Forum was characterized as being "an impressive assembly of qualified arbitrators."[2]

Forum legal professionals serve as arbitrators in cases where the contract of the parties incorporates the Forum Code of Procedure[3] ("the Forum Code") or where the parties otherwise elect to submit their case to the Forum for

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[1] Pursuant to Supreme Court Rule 37.6, the Forum states that this brief was authored in its entirety by the Forum and its counsel. No person other than the Forum made a monetary contribution toward the preparation or submission of this brief.

[2] *Marsh v. First USA Bank*, No. 3:99-CV-0783-T, slip op. at 29 (N.D. Tex. May 23, 2000).

[3] *See* National Arbitration Forum, *Code of Procedure*, Rule 1A (Sept. 1, 1999) (hereinafter *Forum Code*), *available at* <http://www.arb-forum.com>.

resolution.[4] Hundreds of thousands of parties have entered into contracts that choose Forum-administered arbitration as the exclusive means for resolving disputes. Included among those contracts are many credit agreements between banks and consumers.

The Forum has a long-standing interest in seeing that arbitration is made available to all Americans as a simpler, less expensive, and faster alternative to litigation, as was envisioned by the drafters of the Federal Arbitration Act[5] ("FAA"). One means by which that objective can be met is consistent application of the FAA throughout the United States. Uniform application of the FAA to arbitration agreements should result in relatively limited judicial proceedings in advance of any arbitration, consistent with the purpose of the FAA. Inconsistent and incorrect interpretations of the FAA have fostered protracted judicial proceedings in advance of any arbitration, including discovery from providers of arbitration services such as the Forum, with the result that the path to arbitration can become as slow and expensive as if the entire dispute had been litigated.

Based on its years of experience as a provider of arbitration services, the Forum offers to the Court insights on the arbitration process and suggests a refinement of the processes used by courts to implement the FAA and its objectives. It has offered similar insights into the workings of arbitration and the proper application of the FAA as an *amicus* in federal trial and appeals courts.

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[4] *See id.* Rule 1B.

[5] 9 U.S.C. §§ 1-16 (1994).

SUMMARY OF THE ARGUMENT

In applying and interpreting the FAA, this Court has repeatedly affirmed the importance of arbitration as an alternative to litigation. The Court has outlined a variety of advantages that arbitration has over litigation, the principal advantages being that it is cheaper, simpler, and faster. The Forum's first-hand experience and numerous studies of the means of dispute resolution confirm that arbitration provides many persons with access to justice that, for a variety of reasons, these same persons could not obtain in the courts.

Although the issues presented in this case are arguably somewhat narrow — the availability of appellate review of federal court orders compelling arbitration and the arbitrability of claims brought under the Truth in Lending Act[6] ("TILA") — this case and these issues present an opportunity for the Court to reaffirm the importance of parties' honoring their agreements to arbitrate disputes and doing so in a manner, consistent with the terms of the FAA, that permits arbitration to proceed without parties first being subjected to protracted judicial proceedings.

In furtherance of these objectives, the Forum urges that the Court clarify the procedure for judicial review of an arbitration agreement that should occur under the FAA. Specifically, the Court should require that (1) pre-arbitration review be limited to determining whether the agreement to arbitrate satisfies applicable state contract-law standards; (2) intra-arbitration review of such matters as arbitration fees be permitted only when the parties have exhausted the means for resolving the

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[6] 15 U.S.C. § 1601 *et seq.* (1994).

matter within the confines of the arbitration; and (3) all other issues be reserved to post-arbitration review.

By reaffirming a standard procedure for judicial review of arbitration agreements that provides for very limited and expeditious pre-arbitration judicial proceedings, this Court will further the FAA's objectives of providing inexpensive, simple, and fast dispute resolution to all Americans.

ARGUMENT

I. Arbitration Serves an Important Public Purpose by Providing Inexpensive Access to Justice.

A. High costs of litigation keep many Americans from seeking justice in the nation's courts.

As an "adjunct" to the courts, arbitration provides Americans with access to justice that has otherwise become increasingly inaccessible. The American Bar Association ("ABA") calculates that 100 million Americans are locked out of court by high legal costs.[7] Objective surveys suggest that almost twice that number of Americans believe they cannot afford the cost of justice.[8]

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[7] *See Public Loses as Lawyers Block Access to Cheaper Legal Help*, USA Today, Feb. 19, 1999, at 14A.

[8] *See How The Public Views The State Courts: A 1999 National Survey*. National Conference on Public Trust and Confidence in the Justice System (May 14, 1999), *available at* <http://www.ncsc.dni.us/PTC/results/report.htm>; Supreme Court of Texas, Office of Court Administration and State Bar of Texas, *Public Trust and Confidence in the Courts and the Legal Profession in Texas Summary Report* 6 (1999).

The *ABA Journal* reports that most lawyers will not begin a lawsuit worth less than $20,000.[9] Lewis Maltby, of the National Work Rights Center, calculates that, for employees who seek a lawyer, the minimum is closer to $60,000.[10] Maltby predicts that access to justice will be even worse in the future.[11] Conversely, Maltby estimates that the costs of some arbitrations can be as little as five percent of the cost of an equivalent lawsuit.[12]

Arbitration is well received by Americans. Fifty-nine percent of respondents to a Roper survey for the ADR Institute selected arbitration over litigation as a way to resolve claims for money.[13] That percentage grew to 83% when respondents were informed that arbitration could save 75% of the cost of litigation.[14] Ninety-two percent of participants in securities arbitration responded favorably to the experience.[15] An ABA

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[9] *See* Jill Schachner Chanen, *Pumping Up Small Claims: Reformers Seek $20K Court Limits – With No Lawyers*, A.B.A. J., Dec. 1998, at 18, 18.

[10] *See* Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights, in Arbitration Now* 25 (Paul H. Haagan & ABA Section of Dispute Resolution eds. 1999).

[11] *See id.* at 29.

[12] *See id.* at 23.

[13] *See* Roper Starch Worldwide, Inc., *Legal Dispute Study* (Sept. 1999), *available at* <http://www.arb-forum.com> in the Forum Library.

[14] *See id.*

[15] *See Poll Shows Most See Broker-Client Arbitration Process as Fair*, Knight-Ridder News Service (Aug. 6, 1999).

study of consumer attitudes toward arbitration reached similar results.[16]

B. The Forum offers arbitration grounded in substantive law.

What sets the Forum apart from many providers of arbitration services is that its arbitrators must apply the relevant substantive law. In making their decisions, Forum arbitrators — former judges, law professors, and attorneys with at least fifteen years' experience[17] — are bound by the Forum Code, the Forum Bill of Rights, the Due Process Standard, the Forum Code of Ethics, their local rules regarding professional responsibility, and the substantive law that governs the dispute.[18] The Forum's requirement that cases be decided under the applicable substantive law is a significant addition to rules common to arbitration organizations.[19]

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[16] *See* Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication, in Consumer Dispute Resolution* 344 (ABA Special Comm'n on Dispute Resolution 1983).

[17] Communally, these arbitrators are by experience, training, and disposition, models of the "competent, conscientious and impartial arbitrators" to whom this Court has referred. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985)).

[18] *See Forum Code, supra* note 3, Rules 1C, 20A, 20D.

[19] *See* National Arbitration Forum, *A Comparison of Arbitration Rules and Practices* (presented at the 2000 mid-year meeting of the ABA Business Law Section, Jan. 2000), *available at* <http://www.arb-forum.com>; *see also* Edward Brunet, *Replacing Folklore Arbitration*

As Professor Edward Brunet (author of the leading textbook on ADR[20]) states, "The Forum's restriction on subjective awards illustrates the growing acceptance of legally based arbitral awards."[21] In arbitration of statutory claims, this Court has held that parties are entitled to their substantive statutory rights.[22] The United States Court of Appeals for the D.C. Circuit has stated, at least in the case of contracts to arbitrate statutory claims, that this Court "has assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law."[23]

C. Millions of Americans have chosen to resolve their disputes through arbitration.

Arbitration has become an important component of the justice system. Seventy-seven million Americans who now own securities have committed themselves to arbitration,

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with a Contract Model of Arbitration, 74 Tul. L. Rev. 39 (1999).

[20] Edward J. Brunet & Charles B. Craver, *Alternative Dispute Resolution: The Advocate's Perspective* (1997).

[21] *Brunet, supra* note 19, at 57.

[22] *See Gilmer*, 500 U.S. at 26.

[23] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468-69 (D.C. Cir. 1997).

directly or indirectly.[24] A growing number of "e-commerce" web sites contain an arbitration provision.[25]

Arbitration is used today in almost every type of transaction. This universal acceptance is far beyond the limited and narrow applications of the past. In the future, arbitration will be a necessity in "on-line" transactions (*i.e.*, "e-commerce"), and many of those arbitrations will be administered by the Forum.

After an audit of the Forum's procedures, the American Institute of Certified Public Accountants ("AICPA") selected the Forum to provide arbitration services to resolve claims resulting from on-line transactions in connection with web sites that take part in AICPA's CPA WebTrust program.[26] WebTrust covers e-commerce in the United States, Canada, Puerto Rico, England, Scotland, Ireland, and Wales.[27] E-commerce is expected to generate hundreds of millions of transactions annually.

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[24] *See* Richard Nadler, *The Rise of Worker Capitalism*, Cato Policy Analysis, Nov. 1, 1999, at 1, 4; NASD Rule 10101, "Matters Eligible for Submission," *available at* <http://www.nasdr.com/2820_.htm#10101>.

[25] *See, e.g.*, Dell Computer's "Terms and Condition of Sale," *available at* <http://www.dell.com>.

[26] *See CPA WebTrust Now Most Comprehensive Seal of Assurance for Electronic Commerce Web Sites*, Bus. Wire (Mar. 31, 1999). The AICPA is the national association of CPAs in the United States with more than 330,000 members in public practice, business and industry, government and education. *See id.*

[27] *See id.*

Arbitration has also been chosen as the preferred method of dispute resolution with respect to the architecture of the Internet. The Internet Corporation on Assigned Names and Numbers ("ICANN") was created by the United States government to effectively manage the more than 10 million "domain" names now on the Internet.[28] As part of that effort, ICANN has selected the Forum as one of four worldwide providers of arbitration of disputes related to domain names and trademark rights.[29]

II. The FAA's Preference for Arbitration Should Result in Courts Rarely Voiding Agreements To Arbitrate.

The limited pre-judicial review of arbitration agreements advanced by the Forum finds support in the FAA's preference for arbitration over litigation as a means of dispute resolution.

A. The Court has held that the FAA states a preference for arbitration.

In 1995, when this Court decided *Allied-Bruce Terminix Cos., Inc. v. Dobson*,[30] it restated a strong preference for

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[28] *See* U.S. Department of Commerce, Domain Name System Statement of Policy, Docket No. 980212036-8146-02, *available at* <http//: www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm>.

[29] *See* Lubna Kably, *ICANN Names 4th Agency to Settle Domain Disputes*, The Economic Times, May 18, 2000, *available at* 2000 WL 16892861. The other approved providers are the Canadian eResolution Consortium, the United Nations' World Intellectual Property Organization, and the CPR Institute. *See id.*

[30] 513 U.S. 265 (1995).

arbitration. Examining the legislative history of the FAA to determine Congress's intent, the Court ascertained that Congress viewed the FAA as beneficial legislation for consumers and businesses alike.[31] It stated that the FAA, "by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, . . . corporate interests [and] . . . individuals.'"[32]

The Court went on to state its own opinion on the Act: "Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[33] In effect, the FAA was drafted to provide all members of society access to justice, which they may not be able to afford in the traditional lawsuit system.[34]

B. The FAA prefers arbitration over litigation because arbitration provides for practical and effective dispute resolution.

While examining the legislative history of the FAA in *Terminix*, the Court listed the qualities of the arbitration process that make it a preferred method of dispute resolution.[35] The court stated that arbitration (1) is "cheaper and faster than

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[31] *See id.* at 280.

[32] *Id.*

[33] *See id.*

[34] *See* Chanen, *supra* note 9, at 18.

[35] *Terminix*, 513 U.S. at 280.

litigation," (2) has "simpler procedural and evidentiary rules," (3) "minimizes hostility and is less disruptive of ongoing and future business dealings among the parties," and (4) is "more flexible in regard to scheduling of times and places of hearings and discovery devices."[36]

In the growing "on-line" world, where parties to transactions may physically be a continent or a globe apart, arbitration may be the only practical method to resolve disputes.

C. The Court has held that arbitration agreements can be voided only on universal contract law grounds.

Section two of the FAA states that

> a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part, thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[37]

This Court, in determining how an arbitration agreement shall be scrutinized, has continually held that state-law contract principles guide the analysis.[38] In *Perry v. Thomas*, the Court

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[36] *Id.* (quoting H.R.Rep. No. 97-542, at 13 (1982)).

[37] 9 U.S.C. § 2 (1994).

[38] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995);

explained that "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."[39] The *Perry* Court also stated that "[a] court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law."[40]

In *Terminix*, the Court stated that section two of the FAA assures that states have "a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision."[41] It went on to explain that states may regulate all contracts under "general contract law principles."[42] The principle was also reiterated in *First Options of Chicago, Inc. v. Kaplan*, when the Court explained that courts apply "ordinary state-law principles that govern the formation of contracts" when determining whether parties agreed to arbitrate disputes.[43] The Court also implemented a state-law analysis in *Doctor's Associates, Inc. v. Casarotto*, when it held that the

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Terminix, 513 U.S. at 281; *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

[39] *Perry*, 482 U.S. at 492 n.9.

[40] *Id.*

[41] 513 U.S. at 281.

[42] *Id.*

[43] 514 U.S. 938, 944 (1995).

FAA preempts state laws that place arbitration agreements under greater scrutiny than other contract terms.[44]

III. The District Court Found the Parties Had Agreed To Arbitrate Their Dispute; After Taking Interlocutory Review, the Court of Appeals Reversed.

In the instant case, the district court reviewed the contract under state contract law and determined that an "arbitration agreement" existed.[45] The district court ordered the parties to arbitration, despite the fact that the agreement did not define all of the details with respect to the arbitration.

The court of appeals entertained Randolph's appeal, contrary to the weight of authority.[46] In addressing whether the parties had agreed to arbitrate their dispute, the court filled the contract's silence with the worst possible terms (from Randolph's perspective) and, with that reading, determined that the contract was unenforceable because it "fails to provide the

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[44] 517 U.S. 681, 685-87 (1996).

[45] *See Randolph v. Green Tree Fin. Corp.*, 991 F.Supp. 1410, 1425-26 (M.D. Ala. 1997), *rev'd*, 178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000).

[46] *See Randolph v. Green Tree Fin. Corp.-Ala.*, 178 F.3d 1149, 1154 (11th Cir. 1999); *see also Seacoast Motors v. Chrysler Corp.*, 143 F.3d 626, 628-29 (1st Cir.), *cert. denied*, 525 U.S. 965 (1998); *Napleton v. General Motors Corp.*,138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 525 U.S. 931 (1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95-96 (8th Cir. 1994).

minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration."[47]

IV. Federal and State Courts Have Addressed Thousands of Similar Disputes Over the Validity of Agreements To Arbitrate in the Last Several Years.

Since this Court decided *Casarotto*[48] in 1996, the United States Courts of Appeals have decided 277 cases involving arbitration (including the case now before the court)[49] and the state appellate courts have decided 339 such cases.[50] Trial courts have been faced with thousands more. The procedural posture of those cases has been almost as varied as the number of cases.

The issue of interlocutory appeal in the instant case is only one of hundreds of review issues addressed, explicitly and implicitly, by these opinions. Many challenges have asserted state-law contract defenses in attempts to avoid an arbitration contract, as well as arguments that their claims are not subject

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[47] *Randolph*, 178 F.3d at 1158.

[48] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

[49] *See* Westlaw Keynote Search conducted on May 24, 2000; Keynote "33 Arbitration," Jurisdiction "All United States Circuit Courts of Appeal," Additional Terms "da(aft 5/20/1996)."

[50] *See* Westlaw Keynote Search conducted on May 24, 2000; Keynote "33 Arbitration," Jurisdiction "All States," Additional Terms "da(after 5/20/1996)."

to arbitration because of their very nature, such as is made with respect to TILA in this case.

When a challenge to an arbitration contract is raised, courts use a wide variety of procedures and apply similarly varying standards to resolve the arbitrability issue. Such inconsistent approaches foster costly and time-consuming litigation that, in turn, frustrates the purpose of the FAA and the agreements made thereunder. Parties must repeatedly raise multiple claims, because the effectiveness of each claim at any stage is unclear.

To give effect to the imprimatur Congress has given to arbitration, to ease the burdens on the courts below and to further the interests of justice, the Court should take this opportunity to standardize the pre-arbitration review process to be followed under the FAA and decisions of this Court.

V. Under the FAA, Pre-Arbitration Judicial Review of Agreements to Arbitrate Should Be Narrowly Limited.

Although not at issue in this case, challenges to arbitration agreements commonly are made under state contract law, including such contract-law doctrines as unconscionability. Review of how pre-arbitration challenges under state contract law should be handled under the FAA illustrates the need for a uniform procedure for all such pre-arbitration judicial review of agreements to arbitrate.

A. Consistent with the FAA, state-law contract challenges should be resolved expeditiously.

This Court has made it clear that only state-law challenges applying to any contract term will negate an otherwise complete

contract for arbitration.[51] Particularly with regard to the concepts of "unconscionability" and "lack of mutuality," lower courts have taken a variety of tacks in examining the relationship of these issues to the FAA. The most extensive examinations of these defenses by trial courts often include deposition and document discovery, resulting in pre-arbitration judicial proceedings of far greater magnitude than any arbitration of the merits that would have occurred under the contract.[52]

Section four of the FAA provides that the court should examine the "making of the agreement for arbitration" and "being satisfied that [it] is not in issue," shall order the parties "to proceed to arbitration."[53] Congress clearly contemplated that this would be a perfunctory examination. This Court has said that the question "call[s] for an expeditious and summary hearing, with only restricted inquiry into factual issues."[54]

The FAA goes on to provide that, only "if the making of the arbitration agreement . . . [is] in issue," shall the court proceed to a "trial" of that issue.[55] Under section four, the avoidance of the contract requires such a trial, unless the court

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[51] *See Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1995).

[52] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 n.17 (1985) (describing the efficacy sought in arbitration).

[53] 9 U.S.C. § 4 (1994).

[54] *Moses H.Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

[55] 9 U.S.C. § 4 (1994).

can find, as a matter of law, that the agreement violates state-law contract standards.

To give effect to section four, the trial court in which the section-four motion is brought should review the arbitration agreement and the incorporated arbitration rules (if any) to identify terms that would violate applicable contract law. If none are apparent on the face of the documents, the court should order the parties to arbitration. This examination should be made with proper regard for the presumption of validity of any contract[56] and the strong presumption in favor of an agreement for arbitration.[57]

B. The FAA provides for ample post-arbitration review after the facts of the arbitration have been fully developed.

Like other contracts, agreements for arbitration may not always expressly state all of the incidental terms of the agreement or foresee all possible details of the arbitration.[58] The instant case is an example. It is not possible to know exactly what all of the contract terms will mean, in practice, until the arbitration process is begun. The arbitrator may be fair

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[56] *See* 17A Am. Jur. 2d *Contracts* § 333; *see also* Restatement (Second) of Contracts § 203(a) (1979); *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977).

[57] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985).

[58] *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 476 (1989).

or biased; the cost may be low or high; fee-waiver provisions may or may not apply; the defending party may offer to pay all of the fees or not.

Sections 10 and 11 of the FAA provide ample remedies for most claims of arbitral unfairness.[59] Generally, parties to an arbitration should assert their challenges in the arbitration and avoid any return to court until the completion of the arbitration.[60] At that point, petitions for relief under those post-award sections are appropriate. This best preserves judicial resources and, more importantly, provides the district court with a complete record upon which to rule. Not incidentally, many arbitrations will be resolved favorably to a party with a potential procedural claim, obviating the necessity of court intervention on behalf of the claimant.

C. If, after arbitration has been ordered, facts develop that warrant judicial resolution of a defense to the arbitration agreement before the arbitration has been completed, the parties should first be required to exhaust the arbitration-related options before returning to court.

There may arise, in the course of the arbitration process, circumstances creating violations of generally applicable state contract law that a litigant would be unable to resolve by asserting the objection in arbitration and pursuing it in post-award procedures. Hypothetical examples would be a prohibitive cost of the arbitration process or the unavailability

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[59] *See* 9 U.S.C. §§ 10, 11 (1994).

[60] *See id.*

of an arbitrator. These issues would arise only after the court had ordered the parties to arbitration under section four of the FAA and after the claimant had filed the arbitration claim.

The failure of the selection process to produce a qualified arbitrator would not necessarily be apparent until the arbitration process has begun. The actions of the court upon failure of the arbitrator selection process "for any reason" are defined by the FAA.[61] Either party may petition the court for an alternative appointment.[62] If, for instance, the court determined that no unbiased arbitrator (or no arbitrator at all[63]) could be selected from the pool designated by the arbitration agreement, the court can appoint an alternative.[64]

Prior to assertion of the arbitration claim, allegations of prohibitively high costs would be completely speculative. Although the court could earlier examine the published arbitration fees, the actual application of fee payment, fee sharing and fee waivers to the particular claim could occur only after an arbitration claim was asserted.

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[61] *See* 9 U.S.C. § 5 (1994).

[62] *See id.*

[63] *See, e.g., Brown v. ITT Consumer Financial Corp.*, No. 99-10506, 2000 WL 556757 (11th Cir. May 5, 2000).

[64] This Court has made it clear that alleged "bias" of the arbitration administrator will not prevent an arbitration, so long as the agreement or incorporated rules provide, on their face, for an effective selection process. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

The United States Court of Appeals for the Eighth Circuit has addressed such circumstances internal to the arbitration process and has provided guidance for the trial courts and litigants in that circuit on how to handle these claims.[65] This Court should apply that process to all pre-arbitration challenges to an arbitration agreement. Litigants should be required to:

> First, make every reasonable effort to resolve the issue, without returning to the court;
>
> Second, exhaust the remedies for the alleged defect available within the arbitration structure; and
>
> Third, accept the offer of other parties to the contract to modify the contract or process to eliminate the alleged flaw.[66]

This escalating procedure will undoubtedly eliminate almost every asserted imperfection of any arbitration process. More importantly, it will prevent repeated petitions to the district courts and allow the courts to effectively review arbitration processes with a complete record. This Court should apply this process to all "intra-arbitration" challenges under the FAA.

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[65] *See Dobbins v. Hawk's Enterprises*, 198 F.3d 715, 717 (8th Cir. 1999).

[66] *See generally id.*

D. The FAA provides dissatisfied parties with an opportunity for post-arbitration judicial review of an arbitration award.

Enforcement of any arbitration award requires confirmation of the award by a court.[67] Further, in adopting section 10 of the FAA, Congress provided for broad post-arbitration judicial review of arbitration decisions.[68] The range of review extends from even "evident" (not actual) partiality[69] to "any other misbehavior."[70] Of particular interest in the review of arbitration awards has been the review of the exercise of power by the arbitrator(s).

Section 10(a)(4) empowers the court to act "[w]here the arbitrators exceeded their powers."[71] Those powers are, of course, defined by the arbitration agreement of the parties and/or the submission to the arbitrators.[72] Where the parties have given the arbitrators broad powers, the review is limited.[73]

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[67] *See* 9 U.S.C. § 9 (1994).

[68] *Id.* § 10.

[69] *Id.* § 10(a)(2); *see also Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147-49 (1968).

[70] 9 U.S.C. § 10(a)(3) (1994).

[71] *Id.* § 10(a)(4).

[72] *See Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 476 (1989).

[73] *See, e.g., United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("[A]s long as the arbitrator is even arguably

But where the contract restricts the power of the arbitrators, requiring them to follow the law,[74] the court may review the arbitrators' decision for legal accuracy.[75]

This Court has also held that parties are to be afforded all of their substantive statutory rights in arbitration of statutory claims.[76] The "powers" of the arbitrators are, therefore, further restricted in arbitration of statutory claims.[77] The trial court may review an arbitration award resulting from a claim of statutory rights to determine if the arbitrators acted within those constraints on the arbitrator's powers.[78] In the case before the Court, for instance, after the arbitration is complete, a section 10 (a)(4) petition would permit the district court to determine if the arbitrator provided Respondent with her statutory rights under TILA.

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construing or applying the contract and *acting within the scope of his authority*, that a court is convinced he committed serious error does not suffice to overturn his decision." (emphasis added)).

[74] *See Forum Code*, *supra* note 3, Rule 20.

[75] *See Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Syncor Int'l. Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998); *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Stifel, Nicolaus & Co., Inc. v Francis*, 872 S.W. 2d 484 (Mo. Ct. App. 1994); *Faherty v. Faherty*, 477 A. 2d 1257 (N.J. 1984); *Metropolitan Waste Control Comm'n. v. City of Minnetonka*, 242 N.W. 2d 830 (Minn. 1976).

[76] *See Gilmer*, 500 U.S. at 26.

[77] *See id.*

[78] *See id.*

After the arbitration, when all of the relevant events have occurred and the record is before the court, the parties can present to the court facts and applicable legal argument, rather than speculation and innuendo. Moreover, many procedural claims will be obviated by the results of the arbitration. Courts will be required to address only real and necessary issues related to an actual arbitration and will have a record available for review.[79]

The FAA contemplates that the parties have wide latitude in defining the matters submitted to the arbitrators and limiting or expanding the powers of the arbitrators to act. Sections 10 and 11, in turn, provide the court with the power to modify, correct or vacate awards of the arbitrators.[80]

CONCLUSION

The FAA provides parties with access to justice that is otherwise unavailable. To give effect to the goals of the FAA and to assure a fair arbitration process, the Court should establish the following review process:

First, trial courts should review the arbitration agreement and assess the incorporated rules to assure the terms meet minimum state contract law standards. If so, arbitration should be ordered.

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[79] For example, the Forum Code allows the parties to obtain both a record of the proceedings and a written reasoned award. *See Forum Code*, *supra* note 3, Rules 35F & 37G.

[80] *See* 9 U.S.C. §§ 10, 11 (1994).

Second, trial courts should require parties in the arbitration process before returning to court to (1) make every reasonable effort to resolve any issue, (2) exhaust all remedies within the arbitration process, and (3) accept the offer of other parties to modify the contract to eliminate the flaw.

Third, trial courts should exercise the review powers under Sections 10 and 11 of the FAA to assure that parties received every benefit for which they contracted.

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